

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER BARAJAS,

Petitioner,

No. CIV S-01-1572 RRB JFM P

vs.

MIKE KNOWLES, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1998 conviction on charges of kidnapping with intent to commit rape or forcible oral copulation, sexual battery, two counts of forcible oral copulation, penetration of a genital opening with a foreign object, and forcible rape. It was also alleged that petitioner committed counts III through VII under circumstances requiring a 25 year to life sentence. (CT 6-10, 77.) Petitioner was sentenced to a total unstayed determinate term of 16 years on Counts III (6 years), IV (2 years), VI (2 years), and VII (6 years), and to an indeterminate term of 25 years to life on Count V. The midterm of 8 years on Count I was stayed pursuant to Cal. Penal Code S 654. By his traverse, petitioner elected to proceed solely on claim number one in the petition, that petitioner's conviction was based upon false evidence submitted at trial, in violation of his right to a fair trial. (February 14, 2007 Traverse at 2.)

PROCEDURAL HISTORY

1. Petitioner appealed his conviction on July 13, 1998. (CT 194-95.) On June 2, 2000, the judgment was affirmed by the Third District Court of Appeal. (Answer, Ex. D.)

2. On July 10, 2000, petitioner filed a petition for review with the California Supreme Court. (Answer, Ex. E.) On August 16, 2000, the petition was denied. (Answer, Ex. F.)

3. On August 14, 2001, petitioner filed the instant petition.

4. On June 3, 2004, present counsel substituted in as counsel for petitioner due to the death of petitioner's prior attorney.

5. On August 9, 2004, this action was stayed pending exhaustion of unexhausted claims.

6. On December 8, 2004, petitioner filed a state habeas petition in the Sacramento County Superior Court, Case No. 04F10808. (December 9, 2004 Notice.) On February 1, 2005, that petition was denied.¹

7. On December 8, 2006, petitioner confirmed that the Sacramento County Superior Court denied the state habeas petition, finding that the petition had been presented in an untimely manner based on delay which occurred prior to present counsel being retained. (*Id.* at 2 [docket no. 32].) Counsel attempted to discover a satisfactory explanation for the delay but was unable to do so. (*Id.*)

8. On December 14, 2006, the stay was lifted, the instant action was reopened, and petitioner was granted additional time in which to file a traverse. Petitioner's traverse was filed February 14, 2007.

¹ This information was obtained from the Sacramento County Superior Court's Index Search System, accessed February 4, 2008, as follows:
<https://services.saccourt.com/indexsearchnew/xCaseDetailsV2.aspx?SearchValues=BARAJAS,CHRISTOPHER,%20,2838036,3410004F10808>.

FACTS²

About 8:00 p.m. on October 25, 1997, [the] 15-year-old [victim] left the apartment where she was staying and headed toward Fat Ducks, a pizza parlor, a five to ten minute walk. As she walked through the Food Source parking lot, [petitioner] who was in a small black car asked her to “come here and talk to me for a minute.” She ignored him and continued to walk. [Petitioner] drove alongside her and ordered her at gunpoint to get in the car. She did so. He drove off and eventually stopped in a covered parking space at a medical building.

[Petitioner] told [the victim] to feel the gun and when she did, he told her to do as he said and he would not have to use it. He ordered her to remove her shirt, she reluctantly did so and he felt her breasts. He took off his black windbreaker pants and turquoise briefs and demanded that she “go down” on him. He forced her head down and she orally copulated him. [Petitioner] removed [the victim’s] pants and jammed his fingers in her vagina. She told him to stop but he continued. [Petitioner] reclined [the victim’s] seat and climbed on top of her. When he put his penis in her vagina, she felt stabbing pains. She had never before had intercourse. She told him no but he continued. He pulled his penis out, put [the victim’s] leg on the dashboard and then put his penis in her vagina a second time. When he stopped, he got out and urinated in a bush. [The victim] did not run because it was a secluded area and she did not know how to drive a stick shift. When [petitioner] returned, he had [the victim] orally copulate him. [The victim] pulled back and [petitioner] ejaculated. He used some napkins in the car to wipe himself off and then threw the napkins on the ground.

[Petitioner] reached into the back seat, unzipped something and handed [the victim] a piece of Juicy Fruit gum; she put the wrapper in the ashtray. While driving back toward Fat Ducks, he asked her for her phone number. She was nervous and did not think to give him a fake number. She gave him her number but did not want him to call her. He laughed and asked how she would feel if she learned the gun was a water gun.

[Petitioner] dropped [the victim] off at the pizza parlor. [The victim] told her girlfriend that she had been raped. [The victim’s] friends took her back to the area where she had been raped and then to the hospital where the police were summoned.

About 11:30 p.m. on October 25, 1997, Sacramento Police Officer Pete Diaz went to the hospital and interviewed [the victim].

² The facts are taken from the opinion of the California Court of Appeal for the Third Appellate District in People v. Barajas, No.C030151 (June 2, 2000), a copy of which is attached as Exhibit D to Respondent’s Answer, filed October 5, 2001.

1 She told the officer that she had been a virgin. Officer Diaz drove
2 [the victim] to the rape site where napkins and a gum wrapper were
3 found in a parking spare. Officer Diaz then took [the victim] to
4 UCD Medical Center (Center) for a sexual assault exam.

5 At 12:30 a.m. on October 26, 1997, Ana Rose, a physician's
6 assistant and medical examiner with the sexual assault team at the
7 Center, examined [the victim]. Ross concluded there were three
8 tears in [the victim]'s hymen which were fairly recent due to the
9 sharpness or acute nature of the tears and consistent with forcible
10 intercourse. Ross took colposcopic photographs of the injuries
11 which were reviewed by Dr. John McCann, an expert in the field of
12 sexual assaults, and Kathy Boyle, a nurse practitioner. According
13 to Rose, the photographs were of poor quality.

14 [The victim] had some bleeding from her genital area after going
15 home.

16 The next day, [petitioner] was arrested after calling [the victim]
17 and setting up a meeting where [the victim] positively identified
18 him in an in-field show-up. A search of the Jeep [petitioner] had
19 been driving revealed a plastic water gun painted black to resemble
20 a 9 mm Glock semiautomatic handgun. Parked in [petitioner's]
21 driveway, officers found the black car which [the victim]
22 identified. There was Juicy Fruit gum wrapper in the ashtray. A
23 search of [petitioner's] home revealed black nylon pants and
24 turquoise briefs which [the victim] identified as the same or
25 similar.

26 No fingerprint impressions of any kind were found on the inside
or outside of the black car. No latent prints were found on the gum
wrapper or on the water gun. The napkins found at the crime scene
all contained semen which tested as "ABO" type "A," the same as
[petitioner]. [The victim's] blood type if "B." The "PGM" of the
semen suggested [petitioner] was a possible source of the semen.

[Petitioner] testified at trial. He offered [the victim] a ride and
she accepted. He denied showing her anything before she got in
and denied threatening her to get into the car. He drove around
looking for the party [the victim] planned to attend. He parked the
car, they talked to 10 to 15 minutes and then began kissing and
touching each other. She helped him undo her pants. He tried to
get on top of her but it was too cramped in the car. They continued
to hug and kiss but it was awkward. She began masturbating him
and he ejaculated into napkins which he threw into the parking lot.
He wanted her to orally copulate him but she did not want to. He
claimed they never had sexual intercourse. When he got out some
cologne from his backpack, his squirt gun fell out and [the victim]
held it. She gave him her phone number and address and when he
dropped her off at the pizza parlor, she kissed him goodbye. When
interviewed at the police station, he admitted that he had lied and

told officers he had been with a prostitute whom he had met on Stockton Boulevard.

Dr. McCann reviewed the colposcopic photographs, the quality of the photographs was not up to usual standards but was adequate. He disagreed with Ross's conclusions concerning the age of the injuries. He believed any injuries were at least seven to ten days old, could have been years old, and already healed. He could not say that [the victim] had not been raped. An old injury could mask a new injury. He agreed that partial penetration could be painful and yet leave no injuries.

After Dr. McCann testified, [the victim] was recalled to the stand. When she was 9 or 10 years of age, she had sexual intercourse a couple of times with her stepbrother who was at the time also a minor. The incidents were never reported to law enforcement and the issue was "buried." She had told the police she was a virgin because she had not consented to have sex.

(People v. Barajas, slip op. at 2-6.) Petitioner had no prior criminal record. (CT 172.)

ANALYSIS

I. Standards for a Writ of Habeas Corpus

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is "contrary to" clearly established United States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406 (2000)).

Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”) The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

II. Petitioner’s Claims

A. Unconstitutionality of AEDPA

In section II of petitioner’s traverse, petitioner argues that because respondent contends that AEDPA applies and constrains this court’s authority to grant habeas relief, respondent is urging an unconstitutional application of AEDPA. However, on July 9, 2007, the Court of Appeals for the Ninth Circuit held, *inter alia*, that the section of AEDPA limiting the grounds for federal habeas relief for prisoners convicted in state court does not violate the Suspension Clause or the separation of powers. Crater v. Galaza, 491 F.3d 1119 (9th Cir. 2007). This court is bound by that authority.

B. Claim One

Petitioner’s first claim is that he was denied a fair trial because petitioner’s conviction was based upon false evidence submitted at trial. Essentially, petitioner argues that the prosecution presented false evidence by allowing the victim to testify that she was a virgin.

Petitioner also attempts to demonstrate the victim’s testimony concerning her stepbrother’s molestation was perjured. Petitioner provides investigator’s reports from

1 interviews with Jabyne Trujillo, the stepbrother, who denies any penile contact with the victim
 2 took place. (Traverse, Statement Summary, at 1.) Mr. Trujillo recalled he was about eight years
 3 old at the time, while The victim was six years old. Mr. Trujillo insisted it was all a fabrication
 4 based on “playing like little kids play and experiment,” “hugging, rubbing and ‘play kissing.’”
 5 (Id.)

6 Trujillo also stated that

7 in either 1997 or 1998 he received a call from Gary regarding the
 8 instant case. He recalled that Gary explained to him that “[the
 9 victim] was raped,” and that during a medical exam of Ford,
 10 vaginal scar tissue was discovered that pointed to the fact that Ford
 11 had intercourse prior to the alleged rape in the instant case. Gary
 12 stated to him that he had become aware of “things” that occurred
 13 between he and Ford that he was never made aware of before.
 14 Gary then told Trujillo that Ford stated earlier that he raped her.
 15 Trujillo stated that he was uncertain as to what Gary was referring
 16 to, but at Gary’s request, agreed to speak to a person who Gary
 17 identified as “our attorney.” While Trujillo agreed to speak to the
 18 attorney, he advised Gary that he was going to tell the truth about
 the fact that he never had sex with Ford at any time. Gary then
 stated to him that Ford was present and asked Trujillo if he would
 speak to Ford. He agreed, and when she came on the line, she
 stated things such as, “I’ve forgiven you for the things you did.”
 Trujillo stated that he interrupted Ford and told her that he never
 raped or had sex with her. He said Ford came onto the phone line
 and spoke in a soft, friendly voice, which he considered a bit odd
 for someone who was accusing him of rape. Trujillo recalled that
 once he was off of the line with Ford, he never did speak to “the
 attorney” who was allegedly waiting to speak to him.

19 (Id. at 2.) On June 29, 2004, Trujillo signed a declaration under penalty of perjury stating he had
 20 read the June 3, 2004 investigative report and that it accurately set forth the statement he gave to
 21 Investigator John Kirkman. (In re Christopher Barajas, 04F10808, Ex. D [docket no. 18].)

22 Petitioner also presents a telephone statement summary from the investigator’s
 23 telephone interview of Jackie Danette Ford, the victim’s stepmother (and mother of Trujillo),
 24 who described the victim as a “perpetual liar” and “felt strongly that [the victim] was sexually
 25 active during high school.” (Traverse, Telephone Statement Summary at 1-2.) Jackie Danette
 26 Ford also recalled receiving a telephone call from her mother-in-law, Carlene Ford in 1997 or

1 1998. (Id.) Carlene told her that The victim had been raped and that doctors identified vaginal
 2 scar tissue to indicate that The victim had sex prior to her allegation of rape at that time. Carlene
 3 asked her “Do you think that Jabyne would say that he had sex with [the victim]?” (Id.) Jackie
 4 Danette was incredulous and immediately called Trujillo, who became upset at Carlene’s request.
 5 (Id.)

6 Petitioner provides a telephone statement summary from the investigator’s
 7 telephone interview with Gary Ford, Jr., the victim’s brother, who

8 stated that he was approximately thirteen years of age when his
 9 sister, [the victim] . . . alleged that his step brother, Jabyne Trujillo
 10 raped her. He vaguely recalled hearing of the matter when he was
 11 thirteen.

11 (Traverse, Telephone Statement Summary at 1.) “Gary remarked that based upon his knowledge
 12 of Trujillo’s character, the allegation of rape on the part of [the victim] ‘is B.S.’” (Id.)

13 Petitioner also provides a statement summary of the investigator’s interview of
 14 Donna Ford, the victim’s aunt (Gary Ford Sr.’s sister). (Traverse, Statement Summary, at 1.)
 15 Donna stated she was aware that the victim had been “allegedly raped, but was uncertain as to
 16 how long ago the incident occurred,” and was “unaware of the outcome of the trial.” (Id.) When
 17 informed of the victim’s claim that Jabyne had molested her, Donna responded “There is no way
 18 that Jabyne molested [the victim]! . . . Jabyne is a sweet kid . . . who wanted something out of
 19 life.” (Id.) Donna “was certain that if something such as Jabyne molesting [the victim] occurred,
 20 she would have known about it, and added that she was not aware of “a family cover up.” (Id.)

21 The last reasoned rejection of this claim is the decision of the California Court of
 22 Appeal for the Third Appellate District on petitioner’s direct appeal. The state court rejected this
 23 claim on the ground that:

24 [Petitioner] next contends that the victim committed perjury in
 25 falsely testifying she was a virgin and the “prosecution below
 26 failed to correct the falsity by sugar coating the untruth and arguing
 it to the jury.” [Petitioner] argues the “[d]eliberate deception of a

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1 court and jurors by presentation of known false evidence is
2 incompatible with ‘rudimentary demands of justice.’”

3 On direct examination, the victim claimed she had never had
4 sexual intercourse until she was raped by [petitioner]. Her
5 testimony was consistent with her prior statements. Dr. Ross’s
6 report was also consistent with the victim’s representation.

7 After Dr. McCann testified for the defense, the prosecutor spoke
8 with the victim who revealed that when she was nine or ten years
9 of age, she had been sexually molested by her stepbrother. They
10 had engaged in sexual intercourse “[a] couple of times.” She
11 explained that she had considered herself a virgin because it had
12 not been consensual.

13 [Petitioner’s] right to a fair trial is violated when the government
14 knowingly uses false evidence to convict (*Giglio v. United States*
15 (1972) 405 U.S. 150, 153-154 [31 L.Ed.2d 104, 108] or where the
16 government, although it does not solicit the false evidence, does
17 nothing to correct it when it appears. (*Napue v. Illinois* (1959) 360
18 U.S. 264, 269-270 [3 L.Ed.2d 1217, 1221].)

19 There is nothing in the record substantiating [petitioner’s] claim
20 that the prosecution knowingly used false evidence when it
21 presented the victim’s testimony on direct that she had never
22 before had intercourse. The prosecution claimed he learned
23 otherwise when he spoke with the victim after Dr. McCann
24 testified. The prosecution’s lack of knowledge is understandable in
25 that the victim had consistently reported she was a virgin.

26 Perjury requires that a person testifying in court “states as true
any material matter which he or she knows to be false.” (§ 118.)
In explaining that she considered herself a virgin because the
sexual intercourse with her stepbrother had not been consensual,
the victim was mistaken in her belief that she was a virgin but did
not commit perjury. (See *People v. Von Tiedeman* (1898) 120 Cal.
128, 134-137.)

[Petitioner] claims in his reply brief that the prosecution knew
about the victim’s prior sexual activity as demonstrated by his
cross-examination of Dr. McCann. The prosecutor asked Dr.
McCann whether a tear would be present if “there had been some
sort of trauma, even at an earlier age, four or five years or longer.”
[Petitioner] argues “litigators do not ask a question unless they
already know the answer to it, unless you want the answer to blow
up in your face.”

[Petitioner’s] speculation as to why a question was asked does
not refute the prosecutor’s representation that he learned after Dr.
McCann’s testimony about the prior sexual activity between the
victim and her stepbrother.

[Petitioner] further argues that the victim's testimony was "given the stamp of court approval, sugar coating the truth." [Petitioner] claims the prosecution and the court assisted the victim in covering the lie. [Petitioner] claims, "Correcting the falsity does not entail sugar coating it to obtain a conviction, but to elicit truth."

The prosecution corrected the victim's testimony as required when false evidence appears, and the jury had to evaluate whether she was "sugar coating the truth." [Petitioner] has failed to demonstrate that his right to a fair trial was violated.

(People v. Barajas, slip op. at 11-14.)

A criminal defendant's due process rights are violated if prosecutorial misconduct renders a trial "fundamentally unfair." Darden v. Wainwright, 477 U.S. 168, 181-83, 106 S.Ct. 2464, 2471-72 (1986); Drayden v. White, 232 F.3d 704, 713 (9th Cir.2000), cert. denied, 532 U.S. 984, 121 S.Ct. 1630 (2001). "[A] conviction obtained by the [prosecutor's] knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397 (1976) (footnotes omitted); Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766 (1972); Miller v. Pate, 386 U.S. 1, 7, 87 S.Ct. 785, 788 (1967); Hayes v. Woodford, 301 F.3d 1054, 1072 (9th Cir.2002). The same result obtains when the prosecutor, although not soliciting false testimony, allows it to go uncorrected when it appears. See Napue v. Illinois, 360 U.S. 264, 269 (1959); see also United States v. LaPage, 231 F.3d 488, 492 (9th Cir.2000) (if prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts).

"To prevail on a claim based on [the prosecutor's knowing use of false evidence], the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." United States v. Zuno-Arce, 339 F.3d 886, 889-90 (9th Cir.2003).

In the instant case, the victim's earlier testimony that she was a virgin was false; after the defense rested and the prosecution interviewed the victim further, the victim informed

1 the prosecution that the victim had been sexually molested by her stepbrother when she was a
2 young girl. At that time, the prosecutor informed the court, attempting to take steps to correct the
3 record, as required under Napue. The trial court, in an effort to correct the earlier testimony,
4 allowed the prosecution to recall the victim to the stand, at which point the prosecution clarified
5 that the victim misunderstood the meaning of the word “virgin,” and the victim testified that her
6 stepbrother had forced her to have sex when she was about nine or ten years old, but only on a
7 couple of occasions, which she clarified was less than five times. (RT 1068.) The victim
8 confirmed, however, that her testimony concerning petitioner’s acts were true and insisted
9 petitioner had raped her.

10 Petitioner has not demonstrated that the prosecution was aware that the victim’s
11 prior claims to virginity were false at the time the victim testified she was a virgin. Mere
12 speculation regarding the Napue factors is insufficient to meet petitioner’s burden. United States
13 v. Aichele, 941 F.2d 761, 766 (9th Cir. 1991). See Marcella v. United States, 344 F.2d 876, 880
14 (9th Cir. 1965) (“Before a sentence may be vacated on the ground of perjured testimony, the
15 movant must show that the testimony was perjured and that the prosecuting officials knew at the
16 time such testimony was used that it was perjured.”); See also Ortiz v. Stewart, 149 F.3d 923,
17 936 (9th Cir. 1998) (“If a prosecutor knowingly uses perjured testimony or knowingly fails to
18 disclose that testimony is false, the conviction must be set aside if there is any reasonable
19 likelihood that the false testimony could have affected the jury verdict.”). There is no violation
20 merely because a petitioner alleges that false or perjured testimony was introduced. Murtishaw
21 v. Woodford, 255 F.3d 926, 959 (9th Cir. 2001).

22 The record reflects that the victim consistently reported she was a virgin. The
23 victim’s testimony that she was a virgin was consistent with the report of the medical
24 professional who performed the examination on the victim (Dr. Ross). (CT 24, 27, RT 134, 236,
25 248, 263-64, 270, 639, 662.) Petitioner also testified that the victim told him she was a virgin
26 (RT 722), although he later denied that she made such a statement (RT 828).

1 Petitioner attempts to demonstrate the prosecution's knowledge by pointing to the
2 prosecution's cross-examination of Dr. McCann where it was asked whether a tear would be
3 present if there had been trauma, even at an earlier age, four or five years or longer. But, as noted
4 by the state appellate court, mere speculation as to the reason a certain question was asked is not
5 sufficient to meet the factors required by Napue. In addition, both the prosecution and defense
6 counsel were aware of Dr. McCann's report prior to trial.

7 However, the tipping point here is that petitioner has failed to show that there is a
8 reasonable likelihood that the false testimony could have affected the verdict. Grigsby, 130 F.3d
9 at 368. The trial court allowed the prosecutor to call the victim back to the stand where it was
10 made clear to the jury that the victim was not a virgin at the time of the alleged rape. (RT 1058-
11 70.) This rebuttal testimony corrected the record as required under Napue. Because the jury was
12 so informed, petitioner was not prejudiced by the victim's earlier claim of virginity. At that
13 point, it was up to the jury to decide whether the victim was credible.

14 The jury was instructed as to how to determine the credibility of witnesses. (CT
15 103-05.) The jury was also instructed that:

16 [a] witness, who is willfully false in one material part of his or
17 her testimony, is to be distrusted in others. You may reject the
18 whole testimony of a witness who willfully has testified falsely as
to a material point, unless, from all the evidence, you believe the
probability of truth favors his or her testimony in other particulars.

19 (CT 106.) On the ninth day of trial, the jury started deliberating at 10:00 a.m. on April 28, 1998
20 until they reached their verdict at 9:45 a.m. on April 30, 1998, a little over two days later. The
21 jury asked for read back of nurse practitioner Ana Ross' testimony. (CT 147.) Given the read
22 back of Ms. Ross' testimony, the jury may have credited Ms. Ross, who performed the physical
23 examination of the victim, over the testimony of Dr. McCann, who prepared a report disagreeing
24 with Ms. Ross' conclusions after studying photographs.³ "I had findings that I thought were

25 ³ The prosecution conceded in closing argument that Dr. McCann is the leading expert in
26 this field and that the tear in the hymen was old. (RT 1305.)

1 acute on the live person.” (RT 254.) She testified she could see acute injuries to the victim’s
2 hymen. (RT 264.) Ms. Ross testified that she was in the examination room and the lacerations
3 were “fresh wounds.” (RT 270.)

4 Petitioner has failed to demonstrate that the state court unreasonably applied
5 Napue to the facts of this case. The state court’s rejection of petitioner’s first claim for relief was
6 neither contrary to, nor an unreasonable application of, controlling principles of United States
7 Supreme Court precedent. Petitioner’s first claim for relief should be denied.

8 In addition, petitioner insists that the victim’s changed testimony concerning the
9 stepbrother was also false and claims that this means the victim falsely accused another of rape,
10 which is key evidence petitioner was entitled to have presented at trial so the jury could properly
11 assess the victim’s credibility. To the extent that petitioner contends he is entitled to habeas
12 relief because the victim lied when she testified she was molested by her stepbrother or when she
13 claimed she was not otherwise sexually active, the claim also fails.

14 Even absent intentional misconduct by the prosecution, “[a] conviction based on
15 false evidence warrants a new trial ‘if there is a reasonable probability that the result of the
16 proceeding would have been different.’ ” Spivey v. Rocha, 194 F.3d 971, 979 (9th Cir.1999)
17 (citations omitted), cert. denied, 531 U.S. 995, 121 S.Ct. 488 (2000); Killian v. Poole, 282 F.3d
18 1204, 1208 (9th Cir.2002), cert. denied, 537 U.S. 1179, 123 S.Ct. 992 (2003). A reasonable
19 probability is a probability sufficient to undermine confidence in the outcome.” United States v.
20 Endicott, 869 F.2d 452, 455 (9th Cir.1989), citing United States v. Bagley, 473 U.S. 667, 678-80,
21 105 S.Ct. 3375, 3381-83 (1985). A petitioner must demonstrate that the newly discovered
22 evidence would probably have resulted in the defendant's acquittal. Quigg v. Crist, 616 F.2d
23 1107, 1112 (9th Cir. 1980); see also Gordon v. Duran, 895 F.2d 610, 614-15 (9th Cir. 1990).

24 Petitioner has not presented evidence that the prosecution knew the victim was
25 lying when she testified about the molestation or when she denied being sexually active. Rather,
26 petitioner contends the newly-discovered evidence that the victim’s testimony that her step-

brother Jabyne Trujillo had raped her is false is material and probative with respect to the following:

1. The victim's credibility in general; because petitioner admitting having sexual contact with the victim and the defense was consent, so the victim's credibility is key;
2. Petitioner is not the only person the victim falsely accused of sexual assault;
3. The prosecution's attempt to explain the medical evidence concerning the victim's prior sexual activity was supported by false evidence; and
4. The medical evidence demonstrates the victim was sexually active prior to her encounter with petitioner.

(Traverse at 6.)

Petitioner supports this claim by citing Redmond v. Kingston, 240 F.3d 590, 591-92 (7th Cir. 2001)(in habeas petition alleging violation of Confrontation Clause, "the fact that the girl had led her mother, a nurse, and the police on a wild goose chase for a rapist merely to get her mother's attention supplied a powerful reason for disbelieving her testimony eleven months later about having sex with another man, by showing that she had a motive for what would otherwise be an unusual fabrication."); DePetrus v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001)(in another Confrontation Clause challenge, "where a defendant's guilt hinges largely on the testimony of a prosecution[] witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution."); Franklin v. Henry, 122 F.3d 1270, 1273 (9th Cir. 1997)(concluding that, in a sexual assault case, trial court's exclusion of evidence of the complaining witness' prior false accusation of sexual assault was "error of constitutional magnitude" under the Constitution of the United States as it has been interpreted by the Supreme Court of the United States"); overruled on a different point in Payton v. Woodford, 346 F.3d 1204, 1218 (9th Cir. 2003)(en banc); United States v. Stamper, 766 F.Supp. 1396, 1405 (W.D. N.C. 1991)(In prosecution for statutory rape, Stamper moved for permission to introduce certain

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1 evidence. The motion was granted: "Evidence of prior false allegations is so probative of the
2 central issue in a rape case that to exclude it might deny evidence critical to the defense.")

3 Here, however, this newly-discovered evidence does not undermine the court's
4 confidence in the outcome. Dr. McCann testified that the victim's injuries were consistent with
5 both a single episode and repeated sexual activity and that there was no way to distinguish
6 between the two. (RT 1014-15.) The victim's claim to virginity was dispelled and the jury was
7 informed that the victim had previously had sex. The victim attributed it to the molestation by
8 her step-brother. But even if it turned out that the victim had prior sexual activity, it would not
9 change the fact that the victim testified that her sexual contact with petitioner was not
10 consensual, even after she returned to the stand to explain Dr. McCann's medical findings.

11 As noted by the state court, none of the offenses charged required the prosecution
12 to prove that the victim suffered bodily injury during the alleged rape. (People v. Barajas, slip
13 op. at 9.) Dr. McCann did not opine that the victim had not been raped or that forcible
14 penetration of the genital opening with a foreign object, sexual battery or oral copulation did not
15 occur. (Id. at 11.)

16 The record reflects that once the victim returned to the stand, she was questioned
17 by the prosecution:

18 Q. Can you look me in the eyes right here now and tell me that this
19 man over here raped you on October the 25th?

20 A. Yes.

21 Q. Does this fact change any of your testimony that you told this
22 jury earlier this week?

23 A. No. No.

24 Q. Did you tell them the truth about what had – had happened out there?

25 A. Yes, I did.

26 (RT 1063.)

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1 Evidence that the victim was not testifying truthfully in all respects was already
2 before the jury. Defense counsel argued that the victim lied: "She wasn't honest with Detective
3 Barsotti. She wasn't honest with Detective Diaz. She wasn't honest with Mr. Sawtelle (the
4 prosecutor)." (RT 1245.) Defense counsel pointed out the untenable position that the victim's
5 change of testimony presented:

6 Now, she knows that she can't lie about this because we have
7 expert evidence that she's lying about it. So what does she tell
8 you? Well, now she comes in here and she gives you another truth.
9 Now she's going to tell you the real truth. Now, you know, forget
about what she said earlier. Now she wants to tell you the real
truth. The real truth is that she was molested and that she was
molested when she was 9 or 10.

10 Well, it's kind of late in the ball game. We're at the end of this
11 case. There's really no way for us on the defense to somehow be
12 able to go back 9 or 10 years now and determine whether or not
that's true or not. It's really difficult, and I think it would be an
impossible burden to place upon us to prove that she's lying to you.
13 (RT 1248.) The defense pointed out that her testimony as to the location of the gun varied from
14 her statements to the police about the location of the gun. (RT 1253-56.)

15 In this case, again, you're going to have to examine all of the
16 testimony. You're going to have to. You're going to decide
whether the truth favors Mr. Barajas or the truth favors [the
17 victim]. You're going to have to judge the credibility of both
witnesses.

18 So far, I spent a great deal of time going over all of the
19 discrepancies, all the inconsistencies, all the lies that you heard
from [the victim],
20 (RT 1273.)

21 Thus, petitioner's claim viewed as one of newly discovered evidence is no more
22 meritorious. Even assuming arguendo that the Due Process Clause was implicated by the
23 existence of newly discovered evidence, and assuming that the evidence in this case was "newly
24 discovered" and not just additional proof of fabricated testimony, petitioner has failed to show
25 that this new evidence would probably have resulted in his acquittal. As discussed above, the
26 jury was made aware that the victim had previously had sex, which was confirmed by Dr.

1 McCann, and the victim was cross-examined as to the truth of her charges against petitioner.
2 Additional evidence that the victim might not have been molested by her stepbrother would not
3 likely have resulted in an acquittal, particularly in light of Ms. Ross' testimony concerning the
4 victim's mental state and fresh injuries following the alleged rape.

5 Petitioner has not shown that prosecuting officials knew at the time the victim's
6 testimony was used that it was perjured, or that the "new" evidence regarding the victim's claim
7 she was molested by Trujillo would probably have produced an acquittal. Accordingly, this
8 claim should also be denied.

9 Request for Evidentiary Hearing

10 Petitioner requests an evidentiary hearing on his claims. Title 28 U.S.C.
11 § 2254(e)(2) sets forth the circumstances under which a habeas petitioner is entitled to an
12 evidentiary hearing. Under the statutory scheme, a district court presented with a request for an
13 evidentiary hearing must first determine whether a factual basis exists in the record to support a
14 petitioner's claims and, if not, whether an evidentiary hearing "might be appropriate." Baja v.
15 Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999). See also Insyxiengmay v. Morgan, 403 F.3d
16 657, 669-70 (9th Cir. 2005). Petitioner has not demonstrated that any additional facts need be
17 determined for a fair resolution of the merits of any of his claims. Thus, petitioner has failed to
18 overcome the initial hurdle identified above.

19 Even assuming *arguendo* that additional facts need be determined and that
20 petitioner did not receive a full hearing in state court despite his best efforts, petitioner has not
21 demonstrated that an evidentiary hearing is required. A state habeas petitioner is entitled to an
22 evidentiary hearing on a claim only if he alleges "facts that, if proven, would entitle him to
23 relief." Turner v. Calderon, 281 F.3d 851, 890 (2002) (quoting Tapia v. Roe, 189 F.3d 1052,
24 1056 (9th Cir. 1999)) ("[e]ntitlement to an evidentiary hearing based on alleged ineffective
25 assistance, for example, requires a showing that if his allegations were proven at the evidentiary
26 hearing, deficient performance and prejudice would be established"). See also Townsend v.

1 Sain, 372 U.S. 293 (1963) (a defendant is entitled to a federal evidentiary hearing on his factual
2 allegations only if the merits of the factual dispute were not resolved in the state hearing, the state
3 factual determination is not fairly supported by the record as a whole, the fact-finding procedure
4 employed by the state court was not adequate to afford a full and fair hearing, there is a
5 substantial allegation of newly discovered evidence, the material facts were not adequately
6 developed at the state-court hearing, or for any reason it appears that the state trier of fact did not
7 afford the habeas applicant a full and fair fact hearing). As discussed above, petitioner has failed
8 to demonstrate that he is entitled to relief on his claims in this court. Further, this court has
9 determined that relief as to petitioner's claims should be denied on the merits because the state
10 court's decision was not contrary to, or an unreasonable application of, clearly established federal
11 law. Accordingly, an evidentiary hearing is not warranted. See Williams, 529 U.S. at 445.

12 For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's
13 application for a writ of habeas corpus be denied.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
16 days after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that
19 failure to file objections within the specified time may waive the right to appeal the District
20 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: February 14, 2008.

22
23 
24 UNITED STATES MAGISTRATE JUDGE

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